Supreme Court, U.S.
FILED

98 2024 APR 12 1999

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No._____

In The

Supreme Court of the United States

October Term, 1999

MARY and LESTER FURLOW,

Petitioners,

v.

ALLIED CONVEYOR, Inc., and

DURR INDUSTRIES, Ltd.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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34pp

Questions Presented for Review

1. Whether the Appellate Court properly allowed the District Court to invoke Federal Rule of Civil Procedure 49 (b) to declare a finding mandated by a Illinois Pattern Jury Instruction to be a "Special Interrogatory" when the District Court specifically found that no "special interrogatories" were tendered by defendants.

2. Whether the Appellate Court had a duty pursuant to the Seventh Amendment and prior decisions of this Court to attempt to reconcile the jury's findings with the general verdict rather than destroy the general verdict.

3. Whether the Court erred by overturning a jury verdict in the amount of $1,050,000.00 when the United States Court of Appeals for the Seventh Circuit has previously ruled that the allocation of fault between individual tort feasors, each of whom is responsible to the plaintiff for 100% of the judgment; does not affect the right of the plaintiff to collect the judgment.

Table of Contents *Page*

Questions Presented i

Table of Contents..... ii

Table of Authorities..... iii, iiii

Opinions Below..... 1

Statement of the Basis of Jurisdiction of the Supreme Court..... 1

Constitutional, and Statutory Provisions involved in this case vi, v

Statement of the Case..... 9-11

Argument..... 12-27

I. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

II. Pursuant to Federal Rule of Civil Procedure 49 (b). Special Interrogatories must be "upon one or more issues of fact the decision of which is necessary to a verdict."

III. In a diversity case, state law governs the substantive issues. Thus the Court must look to Illinois to determine whether any question asked by the verdict form is necessary to a verdict. If not, there are no special interrogatories to invoke Federal Rule of Civil Procedure 49 (b).

Conclusion.....27, 28.

Appendix.....

Exhibit A.....1 a

Exhibit B.....2 a

Exhibit C.....3-7 a

Exhibit D.....8-15 a

Exhibit F..... 16 a

Exhibit G..... 17 a

Exhibit H.....18-20 a

Parent Companies

The parent company of Durr Industries Ltd., is Durr, Inc.. Durr AG, Stuttgart Germany, is a publicly held company which owns ten per cent or more of the stock of Durr Industries, Ltd.

Table of Authorities *page*

Cases

Gallick v. Baltimore and Ohio Railroad Co. 372 U.S. 108, 83 S. Ct. 659 (1963) *p. 20*

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines Ltd._369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 798 (1962). *pp 19, 20*

Arnold v. Panhandle and Santa Fe Ry

353 U.S. 360, 361, 1 L.Ed. 2d 889, 77 S. Ct. 840 (1957) *p 20*

City of Los Angeles Et al v. Heller 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). *p 27*

Omar v. Sea Land Services Inc. 813 F. 2d 096 9th Cir. 1987) *p 21*

Jansen v. Aaron Process Equipment Company, Aaron Process Equipment Company v. Luxembourg Cheese Factory 149 F. 3d 603 (7th Cir. 1998) *p 18*

*Turyna v. Martam Construction*_83 F. 3d 178 (7th Cir. 1996). *pp. 12, 19, 20*

*Jewell v. Holzer Hospital Foundation, Inc. Et al*_899 F. 2d 1507, 1510, (Sixth Cir. 1990) *p. 21*

Best v. Taylor Machine Works 179 Ill. 2d 367, 689 N.E. 2d 1057, 228 Ill.

Dec. 636 (1997) *pp. 8, 16*

Lily v. Marcal Rope and Rigging, Inc. 289 Ill. App. 3d 1105, 682 N.E. 2d 581, 224 Ill. Dec. 920, (5th Dist. 1997, Appeal denied 175 Ill. 2d 529) *pp. 14, 15, 16*

M.T. Bonk and Company v. Milton Bradley Company and Hasbro Inc. 945 F. 2d 1404, 1406, (7th Cir. 1991) *p 13*

Rules and Regulations

F.R.C.P Rule 49(b) *pp. 6, 7, 12*

Statutes

28 U.S.C. 1254 *p. 2*

740 ILCS 100/1, *pp. 2, 10*

100/2 *p. 2,*

100/3, *p. 2,*

100/4 *pp. 4, 5*

100/5 *p. 5*

735 ILCS 2-1117 *pp. 7, 14*

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Exhibit A, p. 1a. The Judgment of the United States District Court for the Southern District of Illinois is set forth at Exhibit B pp. The District Court Order Denying Plaintiffs' Motion for Modification of Judgment is set forth at Exhibit C pp. The Seventh Circuit Order Denying Rehearing is set forth at Exhibit D p.

Statement of the Basis of Jurisdiction of the Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. &1254. The United States Court of Appeals for the Seventh Circuit issued its Opinion in this case on December

14, 1998. Panel Rehearing and rehearing en banc were timely requested. Rehearing was denied on January 12, 1998. See Appendix at p. 1 This Petition was timely filed within 90 days of the Denial of Rehearing. The United States District Court for the Southern District of Illinois had jurisdiction pursuant to 28 USC 1332 (a).

Constitutional, Statutory, and Ordinance Provisions

1. **740 ILCS 100/1: Application of Act** & 1. This Act applies to causes of action arising on or after March 1, 1978.

100/2. Right of Contribution

& 2. Right of Contribution. (a) Except as provided in this Act, where two or more persons are subject to

liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro-rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro-rata share. No tortfeasor is liable to make contribution beyond his own pro-rata share of the common liability.

sub paragraphs (c) through (f) are not relevant to the instant case, and are set forth in the Appendix.

100/3 Amount of Contribution

& Amount of Contribution. The pro-rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro-rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro-rata liability.

100/4 Rights of plaintiff unaffected

& 4. Rights of Plaintiff Unaffected. A plaintiff's right to collect the full amount of his judgment from any one or more defendants subject to liability in

tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act.

100/5 Enforcement

& 5. Enforcement. A cause of action for contribution among tortfeasors may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action.

2. **Federal Rule of Civil Procedure 49 (b)** States:

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the

decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant o rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58, in accordance with the answers notwithstanding the general verdict, or the court may return the jury for

further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

3. **735 ILCS 2-1117**

Joint Liability. Except as provided in Section 2-118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medically related

expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages. **Held invalid by the Illinois Supreme Court in** *Best v. Taylor Machine Works* 179 Ill. 2d 367,

689 N.E. 2d 1057, 228 Ill. Dec. 636 (1997)

Statement of the Case

This action was brought to recover damages arising out of injuries sustained by Mary E. Furlow in the course of her employment at Nascote Industries Inc., in Nashville, Illinois. Mary E. Furlow filed a complaint containing counts in strict products liability and negligence against Allied Conveyor, Inc., and Durr Industries, Inc..

The District Court had jurisdiction over the above entitled cause pursuant to Title 28 United States Code Section 1332 (a)

Allied and Durr filed complaints for contribution against Nascote

Industries, Inc., Mary Furlow's employer at the time of injury, pursuant to *740 ILCS 100/1 et seq*

The cause was tried before a jury, the jury returned a verdict for the plaintiffs and against defendants Allied Conveyor Inc., and Durr Industries, Inc. Pursuant to the Verdict Form D, an Illinois Pattern Jury Instruction, the jury was directed to apportion fault among the parties. Pursuant to **740 ILCS 100/1: et seq**, and decisions of the Illinois Supreme Court, and the United States Court of Appeals for the Seventh Circuit, the apportionment of fault only arises after one tortfeasor has paid more than his pro-rata share of the common liability. No Special Interrogatories were tendered by the

parties to the appeal. The District Court found that the language requesting apportionment of fault in the Verdict Form D constituted a special interrogatory pursuant to Federal Rule of Civil Procedure 49 (b). The District Court entered judgment for the defendants, and against the plaintiffs. From the entry of judgment plaintiffs brought a timely appeal.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment, on December 14, 1998, (Appendix p.) and denied Plaintiffs' Petition for Rehearing on January 12, 1999. (Appendix p.) From the denial of Petition for Rehearing Plaintiffs bring this timely *Petition. for a Writ of Certiorari*

Argument

I The Verdict Form D is not a general verdict form with special interrogatories.

The District Court improperly held that the language in Verdict Form D, an Illinois Pattern Jury Instruction, directing the jury to allocate fault among all persons responsible for causing Mary Furlow's injuries constituted special interrogatories pursuant to Federal Rule of Civil Procedure 49 (b).

Special interrogatories must be "upon one or more issues of fact the decision of which is necessary to a verdict." Rule 49 (b) *Turyna v. Martam Construction Co. 83 F. 3d 178, (7th Cir. 1996)*

The case at bar is a diversity

case. Illinois law applies to the substantive issues. *M.T. Bonk and Company v. Milton Bradley Company and Hasbro Inc.* 945 F. 2d 1404, 1406, (7th Cir. 1991). Thus the Court must look to Illinois law to determine whether any question asked by the verdict form is necessary to a verdict. If not then there are no special interrogatories to invoke Federal Rule of Civil Procedure 49
(b). The verdict form directs the jury to find the per centage of fault attributable to each person or entity who proximately caused plaintiffs' injuries. (App. p. Verdict Form D) The jury entered per centages as follows; Mary Furlow 40%, Allied Conveyor 0%, Durr Industries 0%, Nascote 60 %.

The issue was addressed in *Lilly v. Marcal Rope and Rigging, Inc.* 289 Ill. App. 3d 1105, 682 N.E. 2d 581, 224 Ill. Dec. 920, (5th Dist. 1997, Appeal denied 175 Ill. 2d 529). In Lily the jury returned a verdict in the plaintiffs favor for $ 1,200,005. On the contribution claim the jury attributed 90% of the fault to the employer, Granite City Steel, and 10% to the defendant, Marcal Rope and Rigging. Marcal asked the court to reduce the judgment because under **735 ILCS 2-1117**, Illinois Code of Civil Procedure; Marcal claimed to be severally liable for Lilly's injuries. Section 2-1117 provided that any tort feasor found to be less than 25% at fault was severally liable. The Court

held that an employer is not a "third party defendant who could have been sued by a plaintiff" thus Marcal was jointly liable for all damages sustained by the plaintiff. *Lilly at 289 Ill. App. 3d 1116.*

The question to be answered, said the Court, is "Whose fault is to be counted in determining whether any particular defendants fault exceeds 25% of the total. The court answered that the employer's fault is not to be counted for this purpose. Lily at 289 Ill. App. 3d 1110. The Court found that the *Contribution Act, 740 ILCS 100/2,* is concerned with sorting out the relative rights of multiple defendants after the plaintiff has collected from among those defendants who are each fully responsible for all

of his damages. *Lilly*_289 Ill. App. 3d 1112. See also *Best v. Taylor Machine Works* 179 Ill. 2d 367, 689 N.E. 2d 1057, 228 Ill. Dec. 636 (1997): A concurrent tort feasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. The fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury." *Best at 179 Ill. 2d 427.*

The comparative fault of Nascote is not considered with respect to entry of judgment. This leaves 60% of fault to be allocated between Durr and

Allied. The Illinois Contribution Act 740 ILCS 100/1 et seq provides in part:

100/3 (b) The right of contribution exists only in favor of a tort feasor who has paid more than his pro rata share of the common liability,....

100/4 Rights of Plaintiff unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this act.

Nascote Industries, Plaintiff's employer, was not a "third party defendant who could have been sued by

the plaintiff." Nascote's per centage of fault is not included in the Joint Liability Act equation set forth in **Ill. Rev. Stat. Ch. 110 Para. 2-117, 1989, 735 ILCS 5/2-117.**

Only the comparative fault of the Plaintiff, and the Defendants sued by the Plaintiff are considered.

Only later in the process does the contribution act allocate responsibility among parties who have been found to be the proximate cause of the full injury. *Jansen v. Aaron Process Equipment Company, Process Equipment Company v. Luxembourg Cheese Factory, Inc.* 149 F. 3d 603 (7th Cir. 1998)

In the instant case, as in *Jansen* the jury found Durr and Allied

each 100% responsible for plaintiff Mary E. Furlow's injury. The allocation of fault is not *"a question the answer to which is necessary to a verdict " thus there is no special interrogatory to invoke Federal Rule of Civil Procedure 49 (b).*

II. Assuming for the purpose of argument that the Verdict Form D does contain Special Interrogatories pursuant to Federal Rule of Civil Procedure 49 (b) entry of Judgment for the Defendants was improper.

Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a

collision with the Seventh Amendment *Atlantic and Gulf Stevedores Inc. v. Ellerman Lines Ltd.*_369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 798 (1962).

When faced with interrogatories that might conflict with a general verdict, the court must take the view of the case that reconciles the interrogatories with the general verdict. *Turyna v. Martam Construction Company* _83 F. 3d 178 (7th Cir. 1996).

A special interrogatory must exhaust every possible ground upon which a verdict could be based in order to overturn a general verdict. *Arnold v. Panhandle and Santa Fe Ry 353 U.S. 360, 361 1 L. Ed. 2d 889, 77 S. Ct. 840 (1957).*

Gallick v. Baltimore and Ohio Railroad Co. 372 U.S. 108, 83 S. Ct.

659 (1963) Omar v. Sea Land Services Inc. 813 F. 2d 096 9th Cir. 1987)

Answers do not present a square conflict with the verdict where they do not exhaust all possible grounds on which verdict could be based; where answers are inconsistent with verdict, verdict may be upheld if there is a there is a possible basis for_verdict that was not addressed by jury interrogatories. *Jewell v. Holzer Hospital Foundation Inc., Et al 899 F. 2d 1507, 1510 (Sixth Cir. 1990).*

The District Court searched diligently for the one view of the case which overturned the jury verdict. The jury found that Allied and Durr were liable to the plaintiffs. (Verdict Form D

appendix p.) There is nothing ambiguous about the jury's Verdict for the Plaintiffs and against the Defendants.

VERDICT FORM D

"We the jury find for the plaintiffs and against the following defendant or defendants:

Allied Conveyor Inc. Yes_X_ No__

Durr Industries , Inc. Yes X No__

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the fault of Mary Furlow, if any, we find that the total amount of damages suffered by the plaintiffs as a proximate

result of the occurrence in question is $1,750,000.00.

Page Two:

Second: As to the contribution claims against third party defendant, Nascote Industries, we find as follows:

For Allied Conveyor Inc., and

against Nascote Industries, Inc. Yes X No___

20

For Durr Industries, Inc. and

against Nascote Industries, Inc. Yes X No___

Third: Assuming that 100% represents the total combined fault of all persons or entities whose fault

23

proximately caused plaintiffs' injuries, including Mary Furlow, any defendant whom you have found liable and any third party defendant you find liable, we find the per centage of fault attributable to each as follows:

(a) Mary Furlow 40%

(b) Allied Conveyor Inc. 0%

(c) Durr Industries, Inc. 0

(d) Nascote Industries Inc. 60%

_____TOTAL 100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any third party defendant was not at fault in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily at fault, then you should enter a zero (0) as to that person or persons.)

Fourth: After reducing the plaintiffs' total damages by the

percentage of fault, if any, of Mary Furlow, we assess plaintiffs' recoverable damages in the sum of $1,050,000.00.

(Signatures)

The Jury Note

The jury note states: "Judge Stiehl We are finding Mary Furlow 40% Responsible and finding Durr and Allied against Nascote. I would like to make sure we have the Form D Filled out correctly.

William L. Mullins

The Court's Response

The Court replied as follows:

June 2, 1997

Ladies and Gentlemen:

I am sorry but I cannot respond to your request. Please review the applicable instructions and apply them to your understanding of Verdict Form D, and then complete the Verdict Form D accordingly.

s/William D. Stiehl
Judge

(App. p.

The District Court found that the jury intended to hold Nascote alone liable.

The Court's Conclusion is not supported by the plain language of the note; or the Verdict Form D.

The conclusion reached by the District Court requires a finding that the jury disregarded the Court's instructions. The theory under which jury instructions are given, and

reviewed on appeal, provides that juries act in accordance with the instructions given them and do not base decisions on legal questions as to which they are not instructed. *City of Los Angeles et al v. Heller* 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

Conclusion

The Decision of the Seventh Circuit is in direct contravention of prior decisions of this Court; and of the Seventh Circuit, and other Circuits which have followed the decisions of this Court. It is a departure from the accepted and usual course of judicial proceedings. If the Decision of the Court of Appeals is allowed to stand defendants will be encouraged to engage in forum shopping

to obtain a favorable result in the Federal Court which would be unavailable in the State Court. For the reasons and authorities cited above this Honorable Court should enter an order directing Judgment for the Plaintiffs on Summary Disposition on the Merits. In the alternative, this Honorable Court should grant Certiorari pursuant to its supervisory power to review the important question of the abuse of the Federal Rules of Civil Procedure to substitute the opinion of the court for the decision of the jury.

Respectfully Submitted,

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October Term, 1999

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

1. Order entered December 14, 1998 by the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court. PP 1-3

2. Order Nunc Pro tunc entered February 5, 1998 by the Honorable William D. Sthiehl, United States District Judge PP 4, 5

3. **Memorandum and Order** entered February 5, 1998 by the Honorable William D. Stiehl, United States District Judge PP 6-12

4. VERDICT FORM D

PP 13-16

5. **Jury Note**

P 17

6. Order Denying Rehearing entered January 12, 1999

by the United States Court of Appeals for the Seventh Circuit

PP 18, 19

7. **Defendant Allied Instruction No. 18 I.P.I. No. B45. Given as Modified PP 22-25**

8. **Defendant Durr's Instruction No. 1 I.P.I. 12.04 Modified for Product Liability P. 26**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 11, 1998

Before

Hon. William J. Bauer,

Circuit Judge

Hon. Frank H. Easterbrook,

Circuit Judge

Hon. Daniel A. Banion,

Circuit Judge

Mary E. Furlow	)	Appeal from
and Lester Furlow,	)	The United
Plaintiffs-	)	States
Appellants	)	District
No. 98-1539	)	Court for the
V.	)	Southern District
Allied Conveyor,	)	of Illinois
Defendants-	)	No. 92-CV-207- WDS
Appellees	)	

Order

A jury in this tort case under the diversity jurisdiction returned a verdict nominally in favor of the plaintiffs against Allied Conveyor, Inc., and Durr Industries, Inc., but added that each of these defendants bore "0 %" of the responsibility for the accident. The jury concluded that plaintiff Mary Furlow bore 40 % of the fault and that Nascote Industries, her employer, bore 60% of the fault. No one asked the judge to direct the jury to continue deliberating to resolve the apparent inconsistency.

On post judgment motions, the district judge concluded that the jury had found Allied and Durr liable only for the purpose of making Nascote pay (it had been named a defendant in third party actions by Allied and Durr). But Nascote could not be directly liable to the plaintiffs, given

the exclusive remedy feature of the workers compensation laws. So the district judge concluded that the "0%" finding took priority over the general verdict under Fed. R. Civ. P. 49 (b), and entered judgment for Allied and Durr. That conclusion is sound, so for substantially the reasons given in the district court's opinion of August 6, 1997, the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARY E. FURLOW) CAUSE No. 92-and
LESTER FURLOW) CV-207-WDS
and LESTER FURLOW)
Plaintiffs,)
V.)
ALLIED CONVEYOR,)
INC. and DURR)
INDUSTRIES, INC.,)
Third Party)
Plaintiffs,)
V.)
NASCOTE INDUSTRIES)
Third Party Defenant.

ORDER NUNC PRO TUNC

STIEHL, District Judge:

The Court hereby amends its Order of August 6, 1997, nunc pro tunc, to provide that Page 3, line 12 shall read as

follows:

(d) Nascote Industries Inc., 60%

This conforms the language of the Court's Order to the language of Verdict Form D.

IT IS SO ORDERED.

DATED: *5 February 1998*

William D. Stiehl

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARY E. FURLOW) CAUSE No. 92- CV-207-WDS

and LESTER FURLOW)

Plaintiffs,)

V.)

ALLIED CONVEYOR,)

INC. and DURR)

INDUSTRIES, INC.,)

Third Party)

Plaintiffs,)

V.)

NASCOTE INDUSTRIES)

Third Party Defenant.)

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court on plaintiffs' motion to modify the order of

judgment entered August 6, 1997. Plaintiffs assert that the Court erred in entering judgment in favor of defendants and against plaintiffs.

Plaintiffs' motion is two-fold. First, plaintiffs assert for the first time, that defendants waived their objections under Fed.R.Civ. Pro. 49(b) to the inconsistent verdicts when they failed to ask the Court to return the jury for further deliberation at the time the verdict was returned. The second is that the Court erred by not ordering a new trial.

1. Waiver under Rule 49 (b).

Plaintiffs now assert that the defendants waived their rights to contest the verdict under Rule 49(b) when they failed to request that the Court resubmit the verdict to the jury and, therefore, the Court erred when it entered judgment.

Initially, the Court notes that neither plaintiffs nor defendants sought further deliberations on the day the verdicts were returned. Additionally, plaintiffs did not argue the issue of waiver in their post trial pleadings.

The Court stated in its August 6, 1997 Order "(W)hen the verdict was returned, the parties did not
seek to have the jury continue its deliberations, but rather moved for entry of judgment." The Court declined the invitation to enter judgment at that time, and sought legal memoranda from the parties on the issue of the inconsistent verdict. Judgment was, however, entered on the separate verdict in favor of defendant Ford Motor Company. Although the jury had been excused, no judgment had yet been entered on the verdict in question, and the Court

BEST AVAI

retained the ability to recall the jury for further deliberation. *See, e.g. Los Angeles Nut House v. Holiday Hardware Corp.* 825 F. 2d 1351, 1356 (9th Cir. 1987).

Plaintiffs assert, however, that defendants waived their rights under Rule 49 (b), relying on the holding in *Cundiff v. Washburn, 393 F. 2d 505 (7th Cir. 1968),* and its progeny. This line of cases has held that there can be a waiver of objection under Rule 49 (b) by either party. This situation arises when the answers to interrogatories are inconsistent with each other and one or more is inconsistent with the general verdict, and the parties did not request that the case be resubmitted to the jury to resolve the inconsistencies.

ABLE COPY

The Court applied the first sentence of the quoted section of Rule 49 (b). Plaintiffs seek to have the sentence control this issue. The relevant portion of Rule 49(b) is:

When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial. Plaintiffs assert

that the Court must either return the case for further deliberations or order a new trial.

As the Court found in its August 6, 1997 Memorandunm and Order, the special interrogatory parts of Verdict Form D were consistent with each other, and only inconsistent with the general verdict of liability against defendants Durr and Allied. The Court found that the jury clearly wanted to find only the third party defendant Nascoste liable, and could do so only through Verdict Form D. This was the only verdict form involving Nascote, but getting to Nascote's liability first required a finding of liability against the defendants. This means, therefore, that the first quoted sentence of Rule 49(b) above, applies to this situation, giving the Court the option of entering judgment.

Durr and Allied each sought to have the jury returned for further deliberation in their post-trial memoranda, but the Court declined to do so due to the lapse of time. The Court was not required to send the case back to the jury, because the only inconsistencies were between the general finding of liability and the specific findings that Durr and Allied were 0% liable, plaintiff was 40% liable, and Nascote was 605 liable. Therefore, that part of Rule 49(b) which permits the Court to resolve the verdicts applied. The Court finds that plaintiffs' argument is without merit and that defendants did not waive any objections under Rule 49(b).

2. judgment under Rule 49(b).

In its Memorandum and Order, the Court determined that the verdict form constituted both general and special

interrogatories. Plaintiffs conceded as much in their memorandum which accompanied their motion for entry of judgment. Plaintiffs now assert that the Court improperly reweighed the evidence in its ruling and entry of judgment. However, under Rule 49(b), the Court "must take the view of the case that reconciles the interrogatories with the general verdict." *Turyna v. Martam Construction Co.* 85 F. 3d 178, 181, (7th Cir. 1996). The Court's Order of August 6, 1997, did precisely that. Reviewing the verdicts and the evidence the Court was then, and remains, convinced that the jury intended to assess liability only against Nascote.

Therefore, the court finds that it did not err in declining to order a new trial, and further finds that plaintiffs have offered no new grounds for the Court to

order a new trial in this case. The Court's judgment, therefore, shall remain, and plaintiffs' motion for modification of judgment is DENIED.

IT IS SO ORDERED.

DATED: 5 February 1998

William D. Stiehl

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARY E. FURLOW) CAUSE No. 92- CV-207-WDS

and LESTER FURLOW)

Plaintiffs,)

V.)

ALLIED CONVEYOR,)

INC. and DURR)

INDUSTRIES, INC.,)

Third Party)

Plaintiffs,)

V.)

NASCOTE INDUSTRIES)

Third Party Defenant.)

VERDICT FORM D

We, the jury, find for the plaintiffs and against the following defendant or defendants:

Allied Conveyor, Inc. YES X NO ___

Durr Industries Inc. YES_X_ NO___

We further find the following:

First: Without taking into consideration the question of eduction of damages due to the fault of Mary Furlow, if any, we find that the total amount of damages suffered by plaintiffs as a proximate result of the occurrence in question is $1,750,000.00

Second: As to the contribution claims against third party defendant, Nascote Industries, Inc., we find as follows:

For Allied Conveyor, Inc. and against Nascote Industries, Inc. YES_X_ NO___

For Durr Industries, Inc. and against Nascote Industries, Inc. YES_X_ NO____

Third: Assuming that 100% represents the total combined fault of all persons or entities whose fault proximately caused plaintiffs injuries, including Mary Furlow

any defendant you have found liable and any third party defendant you find liable, we find the per centage of such fault attributable to each as follows:

(a) Mary Furlow	40%
(b) Allied Conveyor, Inc.	0%
(c) Durr Industries, Inc.	0%
(d) Nascote Industries Inc.	60%
TOTAL	100%

(Instructions to jury: If you find any defendant not liable to the plaintiff, or that any third party defendant or non party was not at fault in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily at fault, then you should enter a zero (0) as to that person or persons.)

Fourth: After reducing the plaintiffs' total damages by the per centage of fault,

if any, of Mary Furlow, we assess plaintiffs' recoverable damages in the sum of $ 1,050,000.00 .

William L. Mullins FOREPERSON	Emma M. Kimball
Sharon A. Koenig	James T. Marks
Dena L. Rowley	Nita M. Nyle
Illegible on copy	Sara McCoy

JURY NOTE (record p. 323)

Just before the verdicts were returned, the jury sent the following note to the Court:

Judge Stiehl:

We are finding Mary Furlow 40% Responsible (sic) and finding Durr and Allied against Nascote. I would like to be sure we have the Form D Filled (sic) out correctly.

s/William L. Mullins

The Court replied as follows:

June 2, 1997

Ladies and Gentlemen:

I am sorry but I cannot respond to your request. Please review the applicable instructions and apply them to your understanding of the Verdict Form D, and then complete the Verdict Form D accordingly.

s/William D. Stiehl
Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 11, 1998

Before

Hon. William J. Bauer,

Circuit Judge

Hon. Frank H. Easterbrook,

Circuit Judge

Hon. Daniel A. Banion,

Circuit Judge

Mary E. Furlow	)	Appeal from
and Lester Furlow,	)	The United
Plaintiffs-	)	States
Appellants	)	District
No. 98-1539	)	Court for the
V.	)	Southern District
Allied Conveyor,	)	of Illinois
Defendants-	)	No. 92-CV-207- WDS
Appellees	)	

ORDER

Plaintiffs' -Appellants filed a petition for rehearing and suggestion of rehearing en banc on December 24, 1998. No Judge in regular active service has requested a vote on the suggestion of rehearing en banc, * and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Judge Rovner took no part in this decision.

Defendant Allied Instruction No. 18 I.PI. No. B45.03 Given as Modified

As to the plaintiffs' claims against the defendants, Allied Conveyor, Inc. and Durr Industries, Inc., an the third party claims of Allied and Durr against the third party defendant, Nascote Industries, Inc. when you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdicts must be unanimous.

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them to into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given

to you by the court.

If you find for the plaintiffs and against either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and if you further find that Mary Furlow was not contributorily negligent, then you should use Verdict Form D, writing in "0%" on Line "(a)" of Paragraph "Third" of Verdict Form D.

If you find for plaintiffs and against either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and if you further find that plaintiff's injuries were proximately caused by a combination of the fault of that defendant or those defendants and Mary Furlow's contributory fault, and that Mary Furlow's contributory fault was 50% or less of the total proximate cause of plaintiff's injuries, then you should use Verdict Form D, writing in the per centage

of Mary Furlow's contributory fault on Line "(a)" of Paragraph "Third" of Verdict Form D.

If you find in favor of the defendants, Allied Conveyor, Inc., and/or Durr Industries, Inc., or that Mary Furlow's contributory fault was more than 50% of the total proximate cause of plaintiffs' injuries for which recovery is sought, then you should use Verdict Forms E and/or F.

If you find for plaintiffs and against either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and that Mary Furlow's contributory fault was 50% or less of the total fault, then you must also return a verdict as to the third-party claims of Allied Conveyor, Inc., and Durr Industries, Inc., against Nascote Industries, Inc.

As to the third party claims against

Nascote Industries, Inc. if you find in favor of either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and against Nascote Industries, Inc., then you should use Verdict Form D, writing in the percentage of fault of Nascote Industries, inc., on Line "(d)" of Paragraph "Third" of Verdict Form D.

If you find in favor of Nascote Industries, Inc., and against Allied Conveyor, Inc., and/or Durr Industries, Inc., then you should use Verdict Form G.

Defendant Durr's Instruction No. 1

I.P.I. 12.04 Modified for Product Liability

Given

More than one person or company may be to blame for causing an injury. If you decide that one or more defendant(s) were at fault and that such fault was a proximate cause of injury to the plaintiff, it is not a defense that some third person(s) or company who is not a party to the suit may also have been to blame.

However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person or company other than the defendants, then your verdict should be for the defendant(s).

Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

No. 98-2024

In The

Supreme Court of the United States

MARY and LESTER FURLOW,

Petitioners,

v.

ALLIED CONVEYOR, INC., and
DURR INDUSTRIES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit Court of Appeals properly affirmed the District Court's decision to enter judgment in favor of Respondent where Petitioners waived their right to object to any inconsistency between the general verdict and the accompanying interrogatories.

2. Whether the Seventh Circuit Court of Appeals properly affirmed the District Court's decision to enter judgment in favor of Respondent where the answers to interrogatories in the verdict found that Respondent was not liable and the District Court's decision to enter judgment in favor of Respondent pursuant to Rule 49(b) of the Federal Rules of Civil Procedure was not against the manifest weight of the evidence.

PARTIES TO THE PROCEEDING

The Petitioners inaccurately list the parties to the proceeding. Durr Industries, Inc., is the proper name of Respondent. Durr, Inc., is the parent corporation of Respondent and Durr, AG, is a publicly held company which owns 10 percent or more of the stock of Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	3
A. Respondent's Version	3
B. Petitioners' Statement of the Case is in Error	7
C. Proceedings in the Seventh Circuit	8
REASONS FOR DENIAL OF THE WRIT	10
A. Verdict Form	10
B. Waiver	12
C. Verdict Not Against the Manifest Weight of the Evidence	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) 15

Barnes v. Brown, 430 F.2d 578 (7th Cir. 1970) 11, 12

Cundiff v. Washburn, 393 F.2d 505 (7th Cir. 1968)....13, 14

EEOC v. Century Broadcasting Corp., 957 F.2d 1446 (7th Cir. 1992)..... 15

Ellston v. Morgan, 440 F.2d 47 (7th Cir. 1971)..... 15

Turyna v. Martam Construction Co., Inc., 83 F.3d 178 (7th Cir. 1996)..... 10, 12, 14, 15

Statutes

28 U.S.C. § 1254(1) 1

735 ILCS 5/13-202..... 9

735 ILCS 5/13-214(a) 9

Rules

Fed. R. Civ. P. 49..... *passim*

Supreme Court Rule 10.....2, 11

Other Authorities

9 Wright & Miller, Federal Practice & Procedure § 2502..... 15

INTRODUCTION

Certiorari should not be granted in this case because the decision by the Seventh Circuit Court of Appeals is not in conflict with any decision of this Court or any United States appellate court. Petitioners waived their rights to object to the inconsistency of the verdict since they failed to ask the District Court to direct the jury to continue deliberating to resolve the apparent inconsistency. Further, the Seventh Circuit properly affirmed the District Court's decision that the special finding by the jury that Respondent was not liable took priority over the general verdict pursuant to Rule 49(b) of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported. Petitioners filed a Motion for Rehearing which the Seventh Circuit denied. The Memorandum and Order of the United States District Court for the Southern District of Illinois directing entry of judgment in favor of Respondent is not officially reported.

JURISDICTION

Jurisdiction over this Petition is proper pursuant to 28 U.S.C. § 1254(1). However, Petitioners fail to proffer a sufficient basis to invoke this Court's review.

Supreme Court Rule 10 provides in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10.

Petitioners suggest that the decision of the Seventh Circuit Court of Appeals conflicts with decisions of this

Court and other United States appellate courts. Petitioners also suggest that the decision by the Seventh Circuit is a departure from the accepted and usual course of judicial proceedings. To the contrary, the Seventh Circuit's affirmance of the District Court's decision is entirely consistent with the leading authority relevant to the issues presented in this case. Moreover, Petitioners' contentions in their Petition constitute mere assertions that the District Court erroneously applied the facts to find in favor of Respondent and misapplied a properly stated rule of law.

Petitioners fail to provide any persuasive or substantive reason why the issues in this case present a conflict with decisions of other United States appellate courts or call for an exercise of this Court's power of supervision. The decisions below constitute correct applications of settled law and no conflict exists. Therefore, denial of the Petition is appropriate.

STATEMENT OF THE CASE

A. Respondent's Version

The Petitioners, Mary Furlow and Lester Furlow, brought a diversity action to recover damages for personal injuries allegedly suffered by Mary Furlow during the course of her employment at the Nascote Industries, Inc. (Nascote), plant in Nashville, Illinois. Petitioner allegedly injured herself in or about April, 1990, while removing an automobile bumper cover from a conveyor

system at the Nascote manufacturing facility. The predecessor to Nascote, Magna International, built the manufacturing plant and contracted with Respondent to install a system for painting bumper covers, which included a conveyor line.

Respondent did not supply, design, manufacture, or install a complete conveyor system for the Nascote plant. Rather, as part of its scope of work Respondent provided for a simple conveyor belt at floor level which went through the different areas of the plant where the bumpers were painted and finished. Attached to the conveyor line was a four wheel trolley which was designed and manufactured by Allied Conveyor, Inc. (Allied). The trolley held a metal rack called a bumper carrier which was designed by Nascote and manufactured by Bennett Metals (Bennett). The bumper carrier held the bumper cover in place as it traveled along the conveyor line through the painting and finishing processes. The bumper carriers were not included in Respondent's original contract, nor was Respondent responsible for their design, manufacture or installation. Respondent completed the color line system at the Nascote plant in 1987.

In 1989, Nascote designed and constructed an addition to the original plant. The new addition was a 153,000 square foot warehouse and manufacturing area. The paint line conveyor was extended into the new addition by Southern Systems, Inc. (Southern), which provided the steel structure and all new parts for the conveyor extension. Respondent was not involved with the extension of the paint line conveyor.

In or about December, 1992, Petitioners brought suit against Respondent. Petitioners alleged, in relevant part, that the design of the color line system caused or contributed to cause Petitioners' injuries. Respondent refuted Petitioners' allegations with undisputed facts that Petitioner was injured in the new warehouse constructed in 1989 by Nascote. It is also undisputed that Respondent did not design nor manufacture the specific product that the Petitioners and their expert criticized.

Following several days of trial, the case was submitted to the jury. Just before the verdict forms were returned, the jury sent the following note to the Court:

> Judge Stiehl:
>
> We are finding Mary Furlow 40% Responsible (sic) and finding Durr and Allied against Nascote. I would like to make sure we have the Form D Filled (sic) out correctly.
>
> s/*William L. Mullins*

The District Court replied to the jury as follows, without objection from the parties:

> June 2, 1997
>
> Ladies and Gentlemen:
>
> I am sorry but I cannot respond to your request. Please review the applicable instructions and apply them to your understanding of Verdict Form D, and then complete Verdict Form D accordingly.
>
> s/*William D. Stiehl*
> Judge

Subsequently, the jury returned Verdict Form D which provided as follows:

VERDICT FORM D

We, the jury, find for the plaintiffs and against the following defendant or defendants:

Allied Conveyor, Inc.	YES X	NO ___
Durr Industries, Inc.	YES X	NO ___

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the fault of Mary Furlow, if any, we find that the total amount of damages suffered by plaintiffs as a proximate result of the occurrence in question is $1,750,000.00.

Second: As to the contribution claims against third party defendant, Nascote Industries, Inc., we find as follows:

For Allied Conveyor, Inc. and against Nascote Industries, Inc.	YES X	NO ___
For Durr Industries, Inc. and against Nascote Industries, Inc.	YES X	NO ___

Third: Assuming that 100% represents the total combined fault of all persons or entities whose fault proximately caused plaintiffs' injuries, including Mary Furlow, any defendant whom you have found liable and any third-party defendant you find liable, we find the percentage of such fault attributable to each as follows:

(a)	Mary Furlow	40%
(b)	Allied Conveyor, Inc.	0%

(c)	Durr Industries, Inc.	0%
(d)	Nascote Industries, Inc.	60%
	TOTAL	100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any third-party defendant or non-party was not at fault in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily at fault, then you should enter a zero (0) as to that person or persons.)

Following the reading of the Verdict Form D, the District Court recognized the apparent inconsistency and instructed the parties to brief their positions relative to how the court should rule. In its written brief, Respondent requested that the District Court reconvene the jury for further deliberations if the apparent inconsistency could not be resolved pursuant to Rule 49(b). On August 6, 1997, the court entered judgment in favor of Respondents.

B. Petitioners' Statement of the Case is in Error

1. Contrary to Petitioners' assertion, the jury did not return a verdict for Petitioners and against Respondents. Rather, the jury returned a general verdict in favor of Petitioners, but answered the accompanying interrogatories by finding that Respondent was not at fault.

2. Petitioners contend that no special interrogatories were tendered by Respondents and that the District Court found that the language of the verdict form constituted a special verdict pursuant to Rule 49 of the

> Federal Rules of Civil Procedure. However, the District Court did not find that the verdict form was a special verdict. Petitioners fail to comprehend the plain meaning of Rule 49. Although Rule 49(a) states that a trial court may require the jury to return a special verdict in the form of a special written finding upon each issue of fact, no special verdict was submitted in this case. To the contrary, the District Court held that the verdict form was a general verdict with accompanying interrogatories which is specifically sanctioned by Rule 49(b). Further, Rule 49(b) dictates a specific method for the trial court to correct any apparent inconsistencies between the general verdict and the accompanying interrogatory answers.

C. Proceedings in the Seventh Circuit

The Seventh Circuit Court of Appeals held that Petitioners failed to ask the District Court to direct the jury to continue deliberating to resolve the apparent inconsistency between the general verdict and the answers to the accompanying interrogatories, and thereby waived any objection to the verdict. As a result, it was soundly within the discretion of the District Court to reconcile the general verdict with the accompanying interrogatory answer pursuant to Rule 49(b). Therefore, the Seventh Circuit affirmed the District Court's conclusion that the answers to the written interrogatories finding that Respondent was not liable took priority over the general verdict.

In reaching its decision, the Seventh Circuit did not decide whether Petitioners' claims were barred by the

applicable statute of limitations. Petitioner was allegedly injured on April 21, 1990. Personal injury actions in Illinois are governed by a two (2) year statute of limitations. 735 ILCS 5/13-202. Petitioners did not file suit against Respondent until December, 1992, more than two (2) years after the injuries occurred.

To get around their statute of limitations problem, Petitioners asserted that their claims were governed by a four (4) year statute of limitations relating to construction design, management and supervision. 735 ILCS 5/13-214(a). However, it is undisputed that Petitioner was injured in the new addition of the Nascote plant on a section of the paint line conveyor built by Southern after Respondent's work was complete. Respondent was not involved in the new addition or the construction of the extension to the paint line conveyor.

Further, Respondent was not responsible for nor involved with the design, manufacture and installation of the bumper carriers which allegedly caused Petitioners' injuries. Respondent's responsibility for design of the paint conveyor line ended with the top of the four wheel trolley. The bumper carriers which allegedly caused Petitioners' injuries were designed by Nascote and manufactured by Bennett to fit into and rest on top of the trolley. Therefore, there was nothing about the original conveyor line built by Respondent which caused or contributed to cause Petitioners' injuries.

Since Respondent did not participate in the design, planning, supervision, observation or management of construction, the four (4) year statute of limitations did not apply. Therefore, Petitioners' claims were time-barred

because they did not file suit against Respondent until two (2) years after the injury.

REASONS FOR DENIAL OF THE WRIT

A. Verdict Form

Rule 49 of the Federal Rules of Civil Procedure provides that the court may, in its discretion, submit a special verdict to the jury or submit a general verdict with written interrogatories. A special verdict under Rule 49(a) is defined as written questions upon issues of fact submitted to the jury which are susceptible of categorical or other brief answer, or written forms of special findings which may properly be made under the pleadings and evidence. Fed.R.Civ.P. 49(a). A general verdict was defined by the Seventh Circuit as one which merely asks the jury to answer the question "who won," and if a monetary award is appropriate, to answer the question "how much." *Turyna v. Martam Construction Co., Inc.*, 83 F.3d 178, 181 (7th Cir. 1996).

The preamble and paragraph First of Verdict Form D are in the form of a general verdict. However, Verdict Form D also contains special written interrogatories in paragraph Third. Rule 49(b) provides that a trial court may "submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed.R.Civ.P. 49(b).

Petitioners complain that the verdict form is not a general verdict with accompanying interrogatories. However, their arguments in the Petition are identical to those raised below. Petitioner is merely asking this Court to reconsider the prior decisions below due to a perceived erroneous factual finding or misapplication of a properly stated rule. Rule 10 is not the proper vehicle for reconsideration of the prior rulings in this case and there is no showing that the decision by the Seventh Circuit is in conflict with this Court's established precedent or other appellate court decisions.

In fact, an early case decided by the Seventh Circuit supports the proposition that Verdict Form D is a general verdict accompanied by written interrogatories. In *Barnes v. Brown*, 430 F.2d 578 (7th Cir. 1970), the jury returned a general verdict in favor of plaintiff and against defendant, and awarded plaintiff $1,000. In addition, the jury was presented with and returned a written interrogatory regarding whether plaintiff was guilty of contributory negligence. The jury answered the written interrogatory in the affirmative which constituted a bar to plaintiff's claim. *Id.* at 579.

The District Court nullified the general verdict, entered judgment on the written interrogatory, and overruled the plaintiff's motion for new trial. The Seventh Circuit affirmed, holding that the District Court's entry of judgment in accordance with the interrogatory answer comported with Rule 49(b) and was consistent with the evidence. The Court further held that when a special verdict is inconsistent with the general verdict, the former controls the latter and a court may enter judgment

accordingly unless the special finding is against the manifest weight of the evidence. *Id.* at 580.

Based upon the foregoing analysis, the District Court was correct in finding that Verdict Form D is a general verdict accompanied by interrogatories pursuant to Rule 49(b). The critical portion of Verdict Form D acts as an interrogatory, requiring the jury to resolve the factual questions of apportionment of fault and proximate cause. Rule 49(b) plainly states that the written interrogatories must be "upon one or more issues of fact the decision of which is necessary to a verdict." *Turyna*, 83 F.3d at 181. As the District Court succinctly stated, "there could be no more necessary *factual* determination than the issue of the percentage of fault among the parties." (Memorandum & Order, Appendix 13a). When the jury entered zero (0) for Respondent, it made a special finding that Respondent was not at fault in a way that proximately caused plaintiff's injury.

B. Waiver

There is no disagreement among the circuits about what constitutes waiver in situations involving a perceived inconsistency with the verdict form. Since Verdict Form D constitutes a general verdict with accompanying interrogatories pursuant to Rule 49(b), plaintiffs' failure to request resubmission of the case to the jury constitutes waiver. Therefore, the standard on review at the circuit level is whether the judgment in favor of Respondent was

against the manifest weight of the evidence. Alternatively, if plaintiffs did not waive objection to the inconsistency of the verdict, then the judgment is reviewed for abuse of discretion.

A similar situation was addressed in *Cundiff v. Washburn*, 393 F.2d 505 (7th Cir. 1968), where the jury returned a verdict against plaintiff on his claim and against defendant on her counterclaim. The jury answered the special interrogatory in the negative finding that plaintiff was not guilty of contributory negligence. *Id.* The District Court recognized the perceived inconsistency between the interrogatory answer and the general verdict and inquired whether plaintiff sought further deliberations from the jury. Plaintiff declined and the District Court proceeded to remedy the situation pursuant to Rule 49(b) by entering judgment against plaintiff. *Id.* at 506.

On appeal, the plaintiff argued that one of the parties must have been negligent and the case could not be a pure accident. The Seventh Circuit disagreed and held that plaintiff waived any objection to the verdict by failing to move for resubmission of the case to the jury. The court went on to say that:

> . . . the rule that objection on grounds of inconsistency is waived by failure to move for resubmission promotes the fair and expeditious correction of error. It requires that the error be corrected in the proceeding in which it is made, by the jury which made it, unless the trial court determines in the exercise of its discretion under Rule 49(b) to enter judgment on the special findings or to order a new trial.

Id. at 507. The Seventh Circuit held that Rule 49(b) allows the District Court wide discretion to choose the means of correcting the inconsistency. The District Court may, in its discretion, reconcile the general verdict with the special findings, resubmit the verdict and the findings to the jury, or order a new trial. *Id.*; *see also, Turyna*, 83 F.3d at 181. Unless the verdict of the jury and the judgment entered thereon are against the manifest weight of the evidence, they will be upheld. *Cundiff*, 393 F.2d at 507.

In the instant proceeding, Petitioners did not move for resubmission of the case to the jury. Rather, they moved for entry of judgment in their favor and against Respondents. As a result, Petitioners waived any objection to an apparent inconsistency between the general verdict and the special finding. Therefore, it was soundly within the discretion of the District Court to reconcile the verdict with the special finding pursuant to Rule 49(b), and enter judgment in favor of Respondent.

C. Verdict Not Against the Manifest Weight of the Evidence

Federal law governs questions of the consistency of special verdicts and general verdicts accompanied by answers to interrogatories in a trial in federal court.

> The courts have uniformly . . . refused to regard state law as controlling on the submission of special verdicts and interrogatories. State law does not govern . . . the effect of inconsistency between a general verdict and a special interrogatory, or any other detail of the special verdict and interrogatory practice.

9 Wright & Miller, *Federal Practice & Procedure* § 2502. That position was adopted by the Seventh Circuit in *Ellston v. Morgan*, 440 F.2d 47, 49 (7th Cir. 1971), and there is nothing to suggest that it conflicts with other circuits or this Court. Therefore, the question of whether the District Court erred in entering a verdict in this case in favor of Respondents is analyzed according to federal law and pursuant to Rule 49(b).

Federal law favors the harmonization of verdicts and answers to interrogatories wherever it is reasonably possible. *Turyna*, 83 F.3d at 181; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) (where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1460 (7th Cir. 1992) (when faced with apparently inconsistent verdicts, we are required to reconcile them, if possible, rather than overturn them.) In paragraph Third of Verdict Form D, the jury was instructed to identify the percentage of fault attributable to the parties, including the Petitioner. The jury was also instructed to enter zero if they found any Respondent not liable to the Petitioner. In particular, Verdict Form D provided that "if you find any defendant not liable to the plaintiff . . . then you should enter a zero (0) as to that person or persons." In accordance with the instruction and consistent with the evidence in the case, the jury entered a zero with regard to Respondent finding that it was not liable to the Petitioners.

Petitioners suggest that the language of Verdict Form D regarding apportionment of fault applies only to the contribution action by Respondents against Nascote.

However, Petitioners ignore the fact that the verdict form was specifically designed to combine the jury's consideration of comparative negligence, joint and several liability, and contribution. Prior to the adoption of these verdict forms, two separate forms of verdict were used in cases involving a simultaneous claim by a plaintiff and claims for contribution: (1) the plaintiff's verdict form set out the amount of damages and the percentage of the plaintiff's comparative negligence; and (2) the contribution verdict form asked the jury to allocate fault among all the contribution parties, with that fault adding up to 100 percent. The present verdict form was designed to eliminate the need for separate calculations or allocations of fault by the jury.

The allocation of fault in Verdict Form D therefore amounts to a special interrogatory. Paragraph Third of Verdict Form D, in and of itself, constituted a definitive determination of who was at fault and the percentage of each party's relative fault. The jury was first instructed to assess the relative percentages of fault of "all persons or entities whose fault proximately caused plaintiff's injuries . . . ," including the plaintiff, any defendant and any third party defendant. Further, the jury was told that if any defendant was "not liable to plaintiff . . . then you should enter a zero (0) as to that [defendant]."

Therefore, based upon the evidence adduced at trial the jury's specific finding in favor of Respondent was not against the manifest weight of the evidence. Further, the District Court properly construed the dictates of Rule 49(b) by entering judgment in accordance with the interrogatory answer, which controls the general verdict. Therefore, the Seventh Circuit's decision upholding the

judgment in favor of Respondent is sound and is not a departure from the accepted and usual course of judicial proceedings, nor is it in conflict with this Court's decisions or the decision of other United States appellate courts.

CONCLUSION

Petitioners fail to establish any basis for granting the Petition. This case does not present a situation where a United States court of appeals has rendered a decision in conflict with this Court's decisions or the decisions of another United States court of appeals. In addition, neither the District Court nor the Seventh Circuit have departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory authority. The opinions by the District Court and the Seventh Circuit are entirely consistent with the precedent of this Court and the other circuits, and the Petition is a mere attempt by Petitioners to seek review of a perceived erroneous factual finding and a perceived misapplication of a properly stated rule of law.

Based upon the foregoing, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-2024

In The

Supreme Court of the United States

MARY E. FURLOW AND LESTER FURLOW,

Petitioners,

v.

ALLIED CONVEYOR, INC. and
DURR INDUSTRIES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the respondent, Allied Conveyor, Inc., was entitled to judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.

(2) Whether the District Court properly found that Verdict Form D was a general verdict with written interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure.

(3) Whether the petitioners waived the right to challenge the District Court's interpretation of the jury's verdict by failing to request that the jury be reconvened in order to resume its deliberations.

(4) Whether the entry of judgment in favor of Allied Conveyor, Inc. was against the manifest weight of the evidence and/or constituted an abuse of discretion.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iv

Argument 1

I. The Judgment In Favor Of Allied Was Properly Affirmed Because Allied Was Entitled To Judgment As A Matter Of Law 1

(a) Plaintiffs Failed To Prove That Allied's Product Was Involved In The Accident, Or That Allied Knew The Use To Which A Conveyor Would Be Put In The New Warehouse Unloading Area Constructed By Others ... 2

(b) Plaintiffs Failed To Prove That Allied's Floor Conveyor, Which Was Built To Durr's Specifications And Was A Component Of The Painting Operation, Was Itself Unreasonably Dangerous Or That The Conveyor Became Unreasonably Dangerous When Integrated Into The Finished Product 3

II. The Judgment In Favor Of Allied Should Be Affirmed Based Upon The Jury's Verdict..... 7

(a) Verdict Form D Was A General Verdict With Written Interrogatories Under Federal Rule 49(b) 8

(b) Because Plaintiffs Did Not Request That The Jury Be Reconvened, Plaintiffs Waived The Right To Object To Any Inconsistency Between The General Verdict And The Answers To The Special Interrogatories ... 9

TABLE OF CONTENTS – Continued

Page

(c) The Entry Of Judgment In Favor Of Allied Was Not Against The Manifest Weight Of The Evidence, Nor Did The District Court Abuse Its Discretion In Entering Judgment 10

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Brown (7th Cir. 1970), 40 F. 2d 578..... 9

Billman v. Frenzel Construction Co. (1st Dist. 1994), 262 Ill. App. 3d 681, 635 NE 2d 435, 200 Ill. Dec. 96..... 2

Busch v. Graphic Color Corp. (1996), 169 Ill. 2d 325, 662 NE 2d 397, 214 Ill. Dec. 831, *cert. den.*, 117 S. Ct. 55, 136 L. Ed. 2d 18..... 1

Cundiff v. Washburn (7th Cir. 1968), 393 F. 2d 505 ..... 7, 9, 10

Curry v. Louis Allis Company, Inc. (1st Dist. 1981), 100 Ill. App. 3d 910, 427 NE 2d 254, 56 Ill. Dec. 174..... 7

Depre v. Power Climber, Inc. (1st Dist. 1994), 263 Ill. App. 3d 116, 635 NE 2d 542, 200 Ill. Dec. 203 5

Elston v. Morgan (7th Cir. 1971), 440 F. 2d 47..... 7

Estate of Carey by Carey v. Hy-Temp Manufacturing, Inc. (7th Cir. 1991), 929 F. 2d 1229..... 5

Gelfand v. Strohecker (D. C. Ohio 1956), 150 F. Supp. 655, *aff'd*, (6th Cir. 1957), 243 F. 2d 797..... 11

Hunt v. Blasius (1979), 74 Ill. 2d 203, 384 NE 2d 368, 23 Ill. Dec. 574 .....3, 4

Kissell v. Westinghouse Electric Corp. Elevator Division (1st Cir. 1966), 367 F. 2d 375..... 8

Kokoyachuk v. Aeroquip Corp. (1st Dist. 1988), 172 Ill. App. 3d 432, 526 NE 2d 607, 122 Ill. Dec. 348 6

Loos v. American Energy Savers, Inc. (4th Dist. 1988), 168 Ill. App. 3d 558, 522 NE 2d 841, 199 Ill. Dec. 179..... 6

TABLE OF AUTHORITIES – Continued

Page

Lum Wan v. P. A. Esperdy (2nd Cir. 1963), 321 F. 2d 123 1

Mechanical Rubber and Supply Co. v. Caterpillar Tractor Co. (3rd Dist. 1980) 80 Ill. App. 3d 262, 399 NE 2d 722, 35 Ill. Dec. 656 3

Pasquale v. Speed Products Engineering (1995), 166 Ill. 2d 337, 654 NE 2d 1365, 211 Ill. Dec. 314 5

Romano v. Howarth (2nd Cir. 1993), 998 F. 2d 101 8

Rotzoll v. Overhead Door Co. (4th Dist. 1997), 289 Ill. App. 3d 410, 681 NE 2d 156, 224 Ill. Dec. 174 ...5, 6

Ruegger v. International Harvester Co. (1st Dist. 1991), 216 Ill. App. 3d 121, 576 NE 2d 288, 159 Ill. Dec. 619 6

Schmidt v. Archer Iron Works, Inc. (1970), 44 Ill. 2d 401, 256 NE 2d 6 2

Scivally v. Time Insurance Co. (10th Cir. 1983), 742 F. 2d 101 1

Smith v. Eli Lilly & Co. (1990), 137 Ill. 2d 222, 560 NE 2d 324, 148 Ill. Dec. 22 2

Sparacino v. Andover Controls Corp. (1st Dist. 1992), 227 Ill. App. 3d 980, 592 NE 2d 431, 169 Ill. Dec. 944 6

Turyna v. Martam Construction Co., Inc. (7th Cir. 1996), 83 F. 3d 178 8

Webber v. Armstrong World Industries, Inc. (4th Dist. 1992), 235 Ill. App. 3d 790, 601 NE 2d 286, 175 Ill. Dec. 889, *app. den.*, 148 Ill. 2d 654, 610 NE 2d 1276, 183 Ill. Dec. 32 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

5 Am. Jur. 2d, Appellate Review, sec. 829, pgs. 488-89 (1995) 1

Fed. R. Civ. P. 49(b) 8

Fed. R. Civ. P. 50 1

Restatement, Third, Torts: Products Liability, sec. 5, pg. 130, *et seq.*, including the Comments, Illustrations and Notes (1998) 7

ARGUMENT

I. The Judgment In Favor of Allied Was Properly Affirmed Because Allied Was Entitled to Judgment As A Matter Of Law.

A reviewing court is not required to accept the reasons given by the trial court for its judgment. The trial court's judgment may be affirmed on any grounds called for by the record, regardless of whether the court relied on those grounds and regardless of whether its reason was correct. *Scivally v. Time Insurance Co.* (10th Cir. 1983), 724 F. 2d 101; *Lum Wan v. P. A. Esperdy* (2nd Cir. 1963), 321 F. 2d 123; *Busch v. Graphic Color Corp.* (1996), 169 Ill. 2d 325, 662 NE 2d 397, 214 Ill. Dec. 831, *cert. den.*, 117 S. Ct. 55, 136 L. Ed. 2d 18; 5 Am. Jur. 2d, *Appellate Review*, sec. 829, pgs. 488-89 (1995).

Under Rule 50 of the Federal Rules of Civil Procedure, judgment as a matter of law may be entered for the defendant when "there is no legally sufficient evidentiary basis" for the plaintiff's claim. In the instant case, Allied was entitled to judgment as a matter of law. The judgment in favor of Allied was, therefore, properly affirmed regardless of the jury's verdict, as the case against Allied should not have been submitted for the jury's decision. Accordingly, the petition for writ of certiorari filed herein should be denied.

(a) Plaintiffs Failed To Prove That Allied's Product Was Involved In The Accident, Or That Allied Knew The Use To Which A Conveyor Would Be Put In The New Warehouse Unloading Area Constructed By Others.

In a product liability action, the plaintiff must identify the manufacturer of the product. *Webber v. Armstrong World Industries, Inc.* (4th Dist. 1992), 235 Ill. App. 3d 790, 601 NE 2d 286, 175 Ill. Dec. 889, *app. den.*, 148 Ill. 2d 654, 610 NE 2d 1276, 183 Ill. Dec. 32. In *Schmidt v. Archer Iron Works, Inc.* (1970), 44 Ill. 2d 401, 256 NE 2d 6, for example, a judgment for the defendant was affirmed because the plaintiff failed to establish a sufficient connection between the defendant and an admittedly defective "eye" pin. Manufacturers are not general insurers of their industry or of products made by others in the industry. *See, Smith v. Eli Lilly & Co.* (1990), 137 Ill. 2d 222, 560 NE 2d 324, 148 Ill. Dec. 22, at pg. 43 (market share liability theory rejected).

Petitioners in the case at bar failed to prove that Allied's product was involved in the accident. In fact, it was undisputed that the new warehouse and unloading area were built by Southern Systems and that Allied had nothing to do with it. Petitioners introduced no evidence indicating that an Allied product was being used in the new area. The jury was permitted to speculate as to whether an Allied dolly or chain were involved. One fact, however, may not be inferred when a contrary fact could be inferred with equal certainty from the same evidence. *Billman v. Frenzel Construction Co.* (1st Dist. 1994), 262 Ill. App. 3d 681, 635 NE 2d 435, 200 Ill. Dec. 96, at pg. 101.

Southern and Nascote were free to design and build a conveyor and unloading area however they desired. According to the testimony adduced at trial, the new conveyor and unloading area were actually constructed and laid out differently from the Allied product. Even if Southern and Nascote used the Allied conveyor as a model and attempted to reproduce it exactly, Allied cannot be held legally responsible for the result. A party may design a product or provide some other service related to the product and have no liability, so long as the party remains outside the chain of manufacturing and distribution. *Mechanical Rubber and Supply Co. v. Caterpillar Tractor Co.* (3rd Dist. 1980), 80 Ill. App. 3d 262, 399 NE 2d 722, 35 Ill. Dec. 656. In the instant case, Allied was clearly outside the stream of commerce with regard to the new construction and profited nothing from it. Furthermore, Allied cannot be charged with knowledge of how a conveyor would be used in an unloading area which had not even been conceived by the time Allied completed its work for Durr.

(b) Plaintiffs Failed To Prove That Allied's Floor Conveyor, Which Was Built To Durr's Specifications And Was A Component Of The Painting Operation, Was Itself Unreasonably Dangerous Or That The Conveyor Became Unreasonably Dangerous When Integrated Into The Finished Product.

It was undisputed at trial that Allied built the floor conveyor involved strictly according to the specifications provided by Durr. In *Hunt v. Blasius* (1979), 74 Ill. 2d 203,

384 NE 2d 368, 23 Ill. Dec. 574, the Illinois Supreme Court explained that:

> "An independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them." 23 Ill. Dec., at pg. 577.

In the instant case, Allied carefully carried out Durr's specifications. There was no evidence adduced to indicate that the specifications were "so obviously dangerous that no competent contractor would follow them." For that reason, Allied owed no duty and breached no duty owed to the plaintiffs.

The Allied product involved in this case was the floor conveyor only. Allied was not responsible for the entire paint line, which was designed and built by other companies. The bumper carriers or racks were specifically excluded from the contract and were designed, built and installed by Nascote itself. Furthermore, Allied had no responsibility for designing an unloading process for the bumpers or to train Nascote employees in any such process. In fact, Allied did not know if the bumpers were to be removed manually or by machine. Allied was, therefore, the manufacturer of a component part of the paint line, which was used by Nascote in the process of painting bumpers.

Illinois law is very clear that because the manufacturer of a component part has no control over that part

once it is sold and no control over its use in the final assembly of a machine, a component part manufacturer may not be held liable if an injury resulted from a dangerous condition created by the party who created the final product. *Depre v. Power Climber, Inc.* (1st Dist. 1994), 263 Ill. App. 3d 116, 635 NE 2d 542, 200 Ill. Dec. 203. As explained by the Seventh Circuit in *Estate of Carey by Carey v. Hy-Temp Manufacturing, Inc.* (7th Cir. 1991), 929 F. 2d 1229:

> "Manufacturers of component parts made to specifications are liable for injuries caused by the fully assembled products, but only if **the component part** was in an unreasonably dangerous condition when it left the defendant's control or if the specifications obviously showed **the part** would become dangerous when integrated into the finished product." 929 F. 2d, at pg. 1234. (emphasis added).

The Illinois Supreme Court has indicated that a component part manufacturer can be held liable only when the injury is directly attributable to a defect in the component part. *Pasquale v. Speed Products Engineering* (1995), 166 Ill. 2d 337, 654 NE 2d 1365, 211 Ill. Dec. 314.

The recent opinion in *Rotzoll v. Overhead Door Co.* (4th Dist. 1997), 289 Ill. App. 3d 410, 681 NE 2d 156, 224 Ill. Dec. 174, illustrates Illinois law regarding the liability of component part manufacturers. Plaintiff's decedent in *Rotzoll* was using a walker to cross the threshold of an automatic sliding door when the door closed, knocking her down and injuring her. Plaintiff contended that safety beams which were supposed to prevent the door from

closing failed to detect the walker, thereby causing the accident.

The defendant, Overhead Door, in the *Rotzoll* case manufactured and sold the automatic sliding door, which included a twin "safety-beam" system for threshold protection. The door system was ordered, installed and configured by Tee Jay Central, Inc. Tee Jay ordered and used motion detectors which initiated the opening and closing of the door from two other manufacturers who were not parties to the action.

In affirming summary judgment in favor of Overhead Door, the court of review explained that:

> "The law in Illinois is clear that the obligation that gives rise to a duty to avoid reasonably foreseeable injury to another does not extend to the anticipation of how manufactured components, not themselves inherently dangerous or defective, can become potentially dangerous when integrated into a unit designed, assembled, installed and sold by another. [Citations omitted.]" 224 Ill. Dec., at pg. 177.

Since the plaintiff failed to prove a defect in the Overhead Door product, summary judgment was properly entered. Illinois case law on the subject all emphasizes that a defect in the component part itself must be present to impose liability on its manufacturer. *Sparacino v. Andover Controls Corp.* (1st Dist. 1992), 227 Ill. App. 3d 980, 592 NE 2d 431, 169 Ill. Dec. 944; *Ruegger v. International Harvester Co.* (1st Dist. 1991), 216 Ill. App. 3d 121, 576 NE 2d 288, 159 Ill. Dec. 619; *Kokoyachuk v. Aeroquip Corp.* (1st Dist. 1988), 172 Ill. App. 3d 432, 526 NE 2d 607, 122 Ill. Dec. 348; *Loos v. American Energy Savers, Inc.* (4th Dist. 1988),

168 Ill. App. 3d 558, 522 NE 2d 841, 199 Ill. Dec. 179; *Curry v. Louis Allis Company, Inc.* (1st Dist. 1981), 100 Ill. App. 3d 910, 427 NE 2d 254, 56 Ill. Dec. 174. This interpretation is also consistent with the general trend and cases from other jurisdictions. *See, Restatement, Third, Torts: Products Liability*, sec. 5, pg. 130, *et seq.*, including the Comments, Illustrations and Notes (1998).

It was undisputed in the case at bar that Allied's conveyor was reasonably safe when it left the manufacturer's control. Allied had no control over the use of its conveyor in the completed system, the number or type of bumper carriers to be used, or the manner of unloading bumpers. Petitioners' evidence was all directed to proving alleged defects in the bumper carriers, to Nascote's decision to unload bumpers manually and to Nascote's failure to train its employees in that process. The Allied conveyor, which was only 14 inches high at its highest point, merely moved slowly forward, as it was designed to do. No defect in the conveyor itself was involved in the accident. At most, the conveyor provided a mere condition or substrate which was acted upon by others to produce Mrs. Furlow's accident.

II. The Judgment In Favor Of Allied Should Be Affirmed Based Upon The Jury's Verdict.

The interpretation and reconciliation of verdicts and special interrogatories is a matter of federal law and is entrusted to the sound discretion of the trial court. *Elston v. Morgan* (7th Cir. 1971), 440 F. 2d 47; *Cundiff v. Washburn* (7th Cir. 1968), 393 F. 2d 505. In the instant case, the

District Court properly found that Verdict Form D consisted of a general verdict accompanied by written interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure. The Court further found that the jury's answers to the written interrogatories controlled the general verdict and entered judgment in favor of Allied. The District Court's ruling was, therefore, properly affirmed on appeal.

(a) Verdict Form D Was A General Verdict With Written Interrogatories Under Federal Rule 49(b).

District Courts have wide discretion in formulating special interrogatories for submission to the jury. *Romano v. Howarth* (2nd Cir. 1993), 998 F. 2d 101. Special interrogatories may consist of mixed questions of law and fact. *Kissell v. Westinghouse Electric Corp. Elevator Division* (1st Cir. 1966), 367 F. 2d 375.

In the instant case, the District Court correctly determined that Verdict Form D consisted of a general verdict with written interrogatories under Federal Rule of Civil Procedure 49(b). In *Turyna v. Martam Construction Co., Inc.* (7th Cir. 1996), 83 F. 3d 178, The Court explained that:

> "General verdicts simply ask the jury to answer the question 'who won', and if the winning party is entitled to a monetary award to answer the question 'how much'." 83 F. 3d, at pg. 181.

Under that definition, the initial finding and paragraph "First" of Verdict Form D qualified as a general verdict. Paragraph "Third" of Verdict Form D, however, specifically told the jury that, "If you find any defendant not

liable to the plaintiff * * * then you should enter a zero (0) as to that person or persons." The District Court pointed out in its order entering judgment in favor of Allied that this constituted a "necessary factual determination."

A similar situation arose in *Barnes v. Brown* (7th Cir. 1970), 430 F. 2d 578. In that case, the jury returned a general verdict in favor of the plaintiff, but answered a written interrogatory to indicate that plaintiff was guilty of contributory negligence. According to the law at the time, contributory negligence was an absolute bar to the plaintiff's claim. Accordingly, the District Court accepted the interrogatory answer and entered judgment in favor of the defendant. The District Court's decision was affirmed on appeal, with The Court stating that when the answer to a special interrogatory contradicts a general verdict, the special interrogatory controls.

(b) Because Plaintiffs Did Not Request That The Jury Be Reconvened, Plaintiffs Waived The Right To Object To Any Inconsistency Between The General Verdict And The Answers To The Special Interrogatories.

In *Cundiff v. Washburn, supra,* the plaintiff brought a negligence action arising out of an automobile accident. The defendant filed a counterclaim against the plaintiff. The jury returned a verdict finding against the plaintiff on his claim and against the defendant on her counterclaim. The jury also responded to a special interrogatory by finding that the plaintiff had not been contributorily negligent. The trial court entered judgment against both claimants, consistent with the jury's general verdict.

On appeal, the plaintiff argued that under Indiana law one of the parties must have been at fault and that in its special interrogatory answer the jury found that the plaintiff was not at fault. The plaintiff concluded that the defendant must have been at fault as a result. Plaintiff asserted, therefore, that the jury's verdict against the plaintiff was inconsistent with the interrogatory answer. The Seventh Circuit, however, found that the plaintiff had waived the argument by answering in the negative when the trial court asked if the jury should be returned to the jury room for further deliberation.

Petitioners in the case at bar failed to request that the jury be returned to the jury room to resume its deliberations. As explained by The Court in *Cundiff*, this left, "to the trial court alone the discretion to choose the means of correcting inconsistency", subject to appellate review. 393 F. 2d, at pg. 507.

(c) The Entry of Judgment In Favor Of Allied Was Not Against The Manifest Weight Of The Evidence, Nor Did The District Court Abuse Its Discretion In Entering Judgment.

Allied has already analyzed the evidence in this case at great length in arguing that it was entitled to judgment as a matter of law. Accordingly, Allied will not repeat that analysis here. Under the facts of this case, it is clear that the jury intended to exonerate Allied and find Nascote directly liable to the plaintiffs. The jury chose the only vehicle seemingly available to accomplish this objective. One purpose of special interrogatories is to give parties

the opportunity to ascertain whether the jury has understood and applied the law properly to the proven facts. *Gelfand v. Strohecker* (D.C. Ohio 1956), 150 F. Supp. 655, *aff'd*, (6th Cir. 1957), 243 F. 2d 797. The special interrogatories here accomplished that objective, as they disclosed that the jury was attempting to produce a result not permitted by the applicable law.

CONCLUSION

For the reasons stated herein, the respondent, Allied Conveyor, Inc., respectfully requests that petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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